**Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [draft]**

## WRITTEN SUBMISSION FROM DALLING SOLICITORS AND NOTARIES ON BEHALF OF THE SOCIETY OF SOLICITORS AND PROCURATORS OF STIRLING

### Sheriff Appeal Court Legal Aid Provision

On behalf of the Society of Solicitors and Procurators of Stirling I write to alert the Justice Committee to our concerns regarding the inadequate provision for remuneration of solicitors appearing before the new Sheriff Appeal Court.

It is the view of my Society that the provisions do not equate to "reasonable remuneration" for the difficult and challenging work which would require to be undertaken for those persons who seek to avail themselves of remedies available from the new Sheriff Appeal Court. As the Committee may be aware the rates which have been fixed for remuneration are the legal aid rates originally set for summary criminal business in 1992. The base rate is £5.25 per quarter hour in connection with travelling to and from the court – a reduction from the 1992 rate. Although it had previously been envisaged that the Sheriff Appeal Court would sit locally that is not now to be the case and therefore travelling is unavoidable for any solicitor who will be appearing before the Appeal Sheriffs in Edinburgh. Rates increase to £10.55 per quarter hour non advocacy and £27.40 per half hour of advocacy, however all these times are conjoinable for work done on the same day. The rates fixed are wholly unreasonable.

It is the considered and indeed unanimous view of the Society that although informal assistance will be provided to convicted persons who wish to appeal conviction/conviction and sentence by, for example, the provision of the appropriate forms for completion, it is simply uneconomic to accept instructions on a legal aid basis in any case which is proceeding to the Sheriff Appeal court and no such instructions will be accepted.

In the field of criminal practice there already exists a considerable cross subsidy between fee paying clients and those who are legally aided. The suggestion that this should extend to the new and difficult area of summary appeal work at a rate of remuneration which is, quite literally from "the last century" is unpalatable, unrealistic and unworkable.

We would urge the Justice Committee to impress upon the Scottish Government and indeed the Scottish Legal Aid Board the need for realistic rates of pay in the field of criminal legal aid.

Kenneth A R Dalling
Solicitor
Secretary to the Society of Solicitors and Procurators of Stirling
28 August 2015

**WRITTEN SUBMISSION FROM FALKIRK AND DISTRICT FACULTY OF SOLICITORS**

I write on behalf of Falkirk and District Faculty of Solicitors to advise the Justice Committee of our grave concerns regarding the provision of legal aid for solicitors appearing before the new Sheriff Appeals Court.

It is clear that the provision made is inadequate. It does not amount to reasonable remuneration in any way. The rates that have been assigned were originally set in 1992.

It is difficult to envisage any other area of work in Scotland where professionals or indeed any other worker is expected to work at rate of pay fixed 23 years ago.

Additionally there is a fundamental access to Justice issue here because it is not going to be practical nor indeed possible for solicitors in Falkirk to carry out appeal work in the Sheriff Appeal Court at these rates where clients are eligible for legal aid.

The Sheriff Appeal Court will be sitting in Edinburgh. It is not difficult to see that £27.40 for a half hours representation in Edinburgh is not going to be sustainable. Travel to and from the Court itself will amount to about £21. The preparation fee that is proposed is less than 30% of the previous rate which is currently applicable.

Accordingly those persons in this jurisdiction who wish to mark an appeal to the Sheriff Appeal Court will not be able to be represented by their solicitor of choice who conducted the Trial here because it will not be sustainable financially for that to happen. They will receive informal advice about their rights of appeal and their methodology of appeal in line with current legal aid regulation. It is difficult to imagine how it can be that rates of pay set out in 1992 were even considered as appropriate in anyway.

Legal Aid rates in general require to be considered and increased as there has been no increase for the best part of quarter of a century. With the apparent reduction in the number of cases being prosecuted according to Scottish Government figures, it is of course now appropriate to consider adequately remunerating solicitors in the summary courts as well. It is difficult to imagine the medical profession being prepared to work at rates of pay which are the best part of a generation out of date.

The disclosure of the rates proposed for the new Sheriff Appeal Court was another shattering blow to the legal profession which is compelled to provide considerable amounts of pro bono work anyway due to the inadequacy of legal aid.

Further it is difficult to see how it can be expected that quality preparation and representation is likely to occur in a new Appeal Court environment where the remuneration offered to professionals having to prepare cases, consider legal submissions, prepare written legal submissions and thereafter make representations before a bench of 3 Judges is in any way possible in 2015 for a payment which is a generation out of date. It seems strangely imbalanced when the Sheriff sitting in the Appeal Court, the Prosecutor, the Clerk and the administrative staff will all be being

paid at 2015 rates when the Defence Solicitors arguing the Appeal will be expected to work at 1992 rates.

We would urge the Scottish Government to listen to its electorate, consider the legal professions position and invite the Scottish Government to direct the Scottish Legal Aid Board to review their decision and thereafter provide "reasonable remuneration" for work that has to be prepared and presented to the Sheriff Appeal Court.

It will be apparent that the danger in not doing so will lead to a vast number of people being unrepresented in the Sheriff Appeal Court, the new project being seen as unworkable and ultimately and inevitably leading to a denial in access to justice to those who most need professional legal representation and may very well be in custody.

Please do all that you can therefore to redress the balance.

Gordon Addison
Secretary of Falkirk & District Faculty of Solicitors
26 August 2015

## WRITTEN SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

**Introduction**
The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

**Background**
The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 were laid in the Scottish Parliament on 9 June 2015. The Regulations make changes to legal aid payment structures in order to accommodate changes made by the Courts Reform Act 2014.

**Comments**
Regulation 3(3) provides that solicitors will be paid detailed fees as set out in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989 for criminal appeals to the Sheriff Appeal Court.

**The impact of the Regulations**
We expect the following impacts:

1. People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal

2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative: he or she will not be able to instruct a solicitor advocate as counsel in the Sheriff Appeal Court

despite the significant experience of solicitor advocates in conducting summary appeals in the High Court

3. The changes will have a disproportionate impact on clients based outwith Edinburgh

We do not believe these outcomes will be positive for the justice system. We do not believe they were intended by the Scottish Civil Courts Review.

## 1. People will have difficulty in finding a solicitor

People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal. This is because it will be difficult for solicitors to act on behalf of these clients because of low payment.

*Existing Arrangements*
At present, summary criminal appeals are dealt with by both counsel and solicitor. Sanction for counsel is automatically granted for all summary appeals on the basis they are heard in the High Court. The work is chargeable:

- By the solicitor, under Part 1 of Schedule 1 of the 1989 Regulations "Part 1"; and
- By counsel, under Part 2 of Schedule 2[E] of the 1989 Regulations "Part 2"

Other than for the representation at the hearings, summary appeal work can be carried out by EITHER a solicitor OR an advocate or solicitor advocate.[1] There are certain items of work that are almost always carried out by the advocate or solicitor advocate because of their complexity and the block fees available under the Part 2 fees. For representation at the Appeal Court hearings, the advocate or solicitor advocate will charge for the advocacy under the Part 2 fees AND the solicitor will charge for supporting the advocacy under the Part 1 fees.

The Part 1 fee rates (fees payable to the solicitor) have not been adjusted since they were fixed in 1992. These detailed fees are not suitable for general summary criminal work and now only apply in limited circumstances, for example, where a block fee is not appropriate because of very significant numbers of witnesses and productions.[2]

*New Arrangements*
All summary criminal appeals will lie to the Sheriff Appeal Court. There will be provision to appeal a decision of the Sheriff Appeal Court to the High Court.[3] Such

[1] For example, if the solicitor carries out an item of work, he or she will charge under the Part 1 fees. If the advocate or solicitor advocate carries out the item of work, he or she will charge under the Part 2 fees.
[2] Under regulation 4A of the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 a solicitor may seek to have a case designated as an exceptional case and is paid, as a result, detailed fees rather than a fixed payment. See Chapter 11.20 of the SLAB Handbook for details of the test to be applied.
[3] Section 119 of the Courts Reform (Scotland) Act 2014, amending the Criminal Procedure (Scotland) Act 1995

an onward appeal may only be made on a point of law, and only with the permission of the High Court. We would expect onward appeals to be extremely rare.[4]

Sanction for counsel will not be automatic in the Sheriff Appeal Court. The Regulations provide that employment of counsel in the Sheriff Appeal Court will need the prior approval of SLAB.[5] We do not expect sanction for counsel to be granted regularly in the Sheriff Appeal Court.[6] In cases where sanction for counsel is not granted, the solicitor will be required to carry out all of the work in a summary criminal appeal, including the advocacy itself. The funding will come from the Part 1 fees only. This limits the funding available for a summary criminal appeal to the extent that the work will not be economically sustainable.

**Examples of changes in funding for specific items of work[7]**

A one hour hearing for an appeal against conviction:

- Under existing arrangements - **£292.20[8]**
- Under the new arrangements - **£54.80[9]**

A half-hour hearing for an appeal against sentence:

- Under existing arrangements - **£171.10[10]**
- Under the new arrangements - **£27.40[11]**

Preparing a 4-page written submission for an appeal against sentence:

- Under existing arrangements - **£100[12]**
- Under the new arrangements - **£24[13]**

Drafting a 3-page Adjustment to a Stated Case for an appeal against conviction:

- Under existing arrangements - **£82[14]**
- Under the new arrangements - **£18[15]**

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[4] Paragraph 135, Financial Memorandum to the Courts Reform (Scotland) Act 2014 - http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd-en.pdf

[5] Regulation 4(3)

[6] Given existing numbers of counsel instructed in lower courts as well as sections 132 and 133 of the Financial Memorandum to the Courts Reform (Scotland) Act 2014.

[7] Comparison of items of work in summary criminal appeal cases under existing arrangements in the High Court against same cases (where sanction for counsel has not been granted) in the Sheriff Appeal Court after regulations are implemented.

[8] Block fee of £250 paid to the Advocate or Solicitor Advocate and £42.20 paid to the solicitor. Existing arrangements allow £250 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

[9] Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

[10] Block fee of £150 paid to the Advocate or Solicitor Advocate and £21.10 paid to the solicitor. Existing arrangements allow £150 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

[11] Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

[12] Block Fee of £100 paid to the Advocate or Solicitor Advocate.

[13] Fee to the solicitor will be £6 per page.

[14] Block Fee of £82-£200 paid to the Advocate or Solicitor Advocate for stated case adjustments.

[15] Fee to the solicitor will be £6 per page.

We believe the fee levels under the new arrangements are inadequate. The rates of remuneration will make summary appeals work unsustainable having regard to the work involved as well as the overheads solicitors incur in preparing and presenting appeals. This will create an access to justice issue for clients.

There is an equality of arms issue. In July, we were advised by the Crown Office and Procurator Fiscal Service that Advocate Deputes, rather than Procurators Fiscal, would be appearing for the Crown in the Sheriff Appeal Court, at least initially.[16] This means that the state will be represented by a senior prosecutor, but legal aid appellants will be underfunded to the extent that they will be unlikely to be able to secure representation.

**2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative**

Solicitor advocates are experienced solicitors who obtain an extension of their rights of audience by undergoing additional training.

The existing legal aid legislation restricts solicitor advocates from the definition of counsel unless they are acting in connection with their extended rights of audience in the High Court.[17] This means that, in lower court cases, it is not possible to instruct solicitor advocates when sanction for counsel has been granted in a legal aid case. This anomaly will be carried over to work undertaken in the Sheriff Appeal Court.

This means that where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court, he or she will have to select an advocate and not a solicitor advocate, despite the fact that solicitor advocates have been conducting summary criminal appeals as counsel in the High Court for over 20 years and have built up significant experience and expertise in this area.

SLAB may consider a request to allow a second solicitor to assist in the conduct of a summary appeal but, even if the second solicitor is a solicitor advocate, he or she will be restricted to the Part 1 fees.[18] Solicitor advocates are unlikely to be willing to continue to carry out this work for the significantly reduced levels of payment.

Where sanction for counsel is granted by SLAB, the legal aid payment available to the advocate will be the same as it is in the High Court. For example, the block fee payable to an advocate for presenting a summary appeal against conviction will be £250. A solicitor (whether or not a solicitor advocate) presenting the case in the Sheriff Appeal Court will receive only £27.40 for the first half hour and £13.70 for

[16] Email from COPFS dated 7 July

[17] The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 regulations define “solicitor-advocate” as "a solicitor who, in relation to the proceedings, has exercised a right of audience conferred by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980”. It is worth noting that there is equivalency between an Advocate and Solicitor Advocate in private cases. The Tables of Applicable Fees within the Acts of Sederunt are the same for both Advocates (Counsel) and Solicitor Advocates - Acts of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (as amended)

[18] SLAB Draft Guidance, received by the Society on 25 August 2015

each subsequent quarter hour. For a half hour hearing, the solicitor or solicitor advocate will receive less than a ninth of the remuneration available to the advocate.

Where sanction for counsel is granted, the legal aid client will be restricted in his or her choice of representative. He or she will have no option but to choose an Advocate. The option to instruct a solicitor advocate as counsel will be available for private payers only. The arrangements deprive clients of choice of representative and restrict competition within the legal aid market place.

### 3. The changes will have a disproportionate impact on clients based outwith Edinburgh

Summary criminal appeals will continue to be administered centrally with work being focussed in Edinburgh.[19]

The regulations create practical problems. At present, much appeal work emanating from outside Edinburgh is referred to Edinburgh firms on an agency basis. The reduction in funding means that the Edinburgh-based referral network will cease to operate for summary appeals. For example, the Part 1 fee rates, by themselves, are too low to allow a solicitor or appellant to negotiate an agency fee with agents in Edinburgh.

It is not realistic to expect solicitors to travel to the Sheriff Appeal Court in Edinburgh for the low rates available. This will create difficulties for appellants based outwith Edinburgh. For example, where a person in Inverness is unfairly convicted, he or she is unlikely to be able to find an Inverness-based solicitor willing to travel to Edinburgh to conduct a 30 minute summary appeal hearing for remuneration of £27.40 and limited travel fees.

We recommend that steps are taken to ensure that appellants are able to engage with the centralised Sheriff Appeal Court through each of the local lower courts in Scotland, limiting the need for solicitors or unrepresented appellants to have to travel to Edinburgh, at least for pre-Hearing matters.

### Alternative suggestions

In our comments on the draft regulations we suggested that the Government introduce a block fee for summary appeals work. The Government responded that it lacked the time and data to introduce a block fee.[20] As an interim measure, we suggested that the High Court rate that is currently paid to junior counsel for conducting appeals could be adopted for this work. In other words, rather than limiting the solicitor to charging the Part 1 fees, the solicitor could be allowed to charge the Part 2 fees for certain items of work. This would allow time for costing work to be carried out for the introduction of a block fee whilst providing adequate remuneration in the interim. This would generate savings to the legal aid fund

[19] SPICe Briefing, Courts Reform (Scotland) Bill, page 27
http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-23.pdf
[20] Email from Scottish Government, 18 May 2015

because SLAB would be paying for only one legal representative. The Government simply stated that these fees were reserved to counsel.[21]

**Conclusion**

The Part 1 Fees do not reflect the specialist type and amount of work that requires to be undertaken in a summary criminal appeal. It is disappointing there has been no attempt to review the complexity of the work to determine a reasonable remuneration for the solicitor. Preparing and presenting a summary criminal appeal is complex and requires skills not found elsewhere in summary criminal business. The work is time-consuming. Many hours of preparation are often necessary and complex documents are required to be drafted and submitted to the court before the full hearing. The work cannot be undertaken for the low levels of payment proposed.

In 2013-14 there were 714 legal aid applications granted for summary criminal appeals.[22] Over the years, the number of appeals for summary criminal appeals has been on a gradual downward trend, reducing in line with summary criminal cases overall. However, the rate of summary cases being appealed has remained reasonably consistent at around 1.7%.[23] We expect a reduction in this rate and expect an increase in the number of unrepresented accused in summary appeals. We would encourage the Scottish Government to monitor the relevant statistics and we undertake to assist in this process.

Appeals from courts of summary criminal jurisdiction have made an important contribution to modern jurisprudence and have helped shape the law in Scotland.[24] A properly funded Sheriff Appeal Court would safeguard the integrity of Scots law and preserve access to justice by creating an accessible court structure. Unfortunately, the low payment rates means that legal aid clients will have serious difficulty in accessing the Sheriff Appeal Court.

In conclusion, the Society cannot support these regulations.

Matthew Thomson
Legal Aid Policy Officer
28 August 2015

## SUPPLEMENTARY WRITTEN SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

We are grateful for the Justice Committee's consideration of the regulations affecting summary criminal appeals before the new Sheriff Appeal Court (SAC). Since the Committee's meeting of 8 September, we offered to and have met with officials from Scottish Government and the Scottish Legal Aid Board. This supplementary response summarises our concerns around the regulations.

[21] Policy Note to the Regulations
[22] Data received from the Scottish Legal Aid Board, 27 July 2015
[23] Paragraph 136 of the Financial Memorandum to the Criminal Courts Reform (Scotland) Bill
[24] Some example of important summary appeal cases include: Starrs v Ruxton, 2000 J.C. 208, Ambrose v Harris 2011 SCCR 651, Speirs v Ruddy 2008 SLT 39

**Status quo**
All summary and solemn criminal appeals are currently heard by the High Court of Justiciary (HCJ) sitting as a court of appeal, customarily sitting in Edinburgh. There were 911 appeals in 2013-14 out of 76,555 summary complaints. For the appellant, a solicitor will instruct either a solicitor advocate or advocate, as there is automatic sanction for counsel. Many appellants will not reside in Edinburgh, where the court sits, nor are their solicitors based in Edinburgh. Therefore, their solicitor can engage a local Edinburgh solicitor, who will instruct the appeal. Both the local solicitor and the Edinburgh agent share the fees accrued from this role.

**Sheriff Appeal Court**
The SAC is due to commence on 22 September. The Courts Reform (Scotland) Act 2014 (s118) transfers all of the powers and jurisdiction of the HCJ for summary criminal appeals to this new judicial tier. This new court is part of the package of measures introduced by the 2014 Act to ensure that cases are heard at the most appropriate judicial tier and dealt with by the most appropriate people. For the appellant, a solicitor will appear. In more complex or novel cases, an application can be made to SLAB for sanction for counsel to appear. Unlike HCJ appeals, prior legal aid regulations prevent solicitor advocates from appearing as counsel: they may appear as a solicitor, though the difference in fees between solicitors and counsel is significant.

**Legal aid fees – proposed rates**
The regulations currently before the Committee establish the fee structures for solicitors and for counsel at the SAC. These are set by reference to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. These fees were last revised in 1992 and on an inflation adjusted basis, have reduced by 47.8% since in real terms. The fee available for advocacy is £54.80 per hour. Most HCJ hearings are set for half hour periods, and we expect similarly so in the SAC. Other fees available include travel, at £21.12 per hour, fixed fees of £6 for witness citation and execution, £2.40 for lodging documents at court, 5p per sheet of photocopying case bundles and £42.20 per hour for other work. It is from such fees that the overheads of running a small to medium sized enterprise must be met. By comparison, our Cost of Time Survey, which provides a transparent and objective method of establishing benchmark hourly rates, suggests an hourly expense rate for firms of £141.

**Legal aid fees – from High Court to Sheriff Appeal Court**
The fees available for solicitors to conduct SAC work are significantly less than those available for solicitor advocates or advocates for HCJ appeal work. For instance, for a one hour hearing for an appeal against conviction, under existing arrangements the fee would be £292.20; under the new arrangements, £54.80. For a half-hour hearing for an appeal against sentence, under existing arrangements the fee would be £171.10; under the new arrangements, £27.40. For the preparation of a 4-page written submission for an appeal against sentence, under existing arrangements the fee would be £100; under the new arrangements, £24. For the drafting of a three page Adjustment to a Stated Case for an appeal against conviction, under existing arrangements the fee would be £82; under the new arrangements, £18. As mentioned above, we believe that the demands of appeal work will remain broadly the same in the new SAC as in the HCJ currently and do not think that a radically different scale of fees is acceptable.

**Legal aid fees – 'time and line'**
The fees paid under these regulations are 'time and line', providing fees per hour and requiring detailed account submission. The fee increases in proportion to the time spent on the appeal. SLAB published on Thursday 10 September a number of specimen accounts. These highlight a number of challenges for access to justice. For instance, in the example cited of a solicitor attending from Inverness, for the day of the appeal, the total fees accrued are £244.83 for nine hours and forty-five minutes of work: an hourly rate of £25.91 gross to the firm, from which salaries, national insurance, office rent, utilities, support staff, ICT and other costs must be met (and in due course, auto-enrolled pension contributions and living wage). Overall, for this example, 16 hours and 22 minutes of work are recorded and 33 separate items of work are accounted for a total fee of £696.53. In broad terms, this would equate to an hourly rate of around £42.65. However, only 15 of the 33 accounted items of work actually record the time involved; significantly more than 16 hours would have been expended on such an appeal, and consequently, the hourly rate for the total work involved, in our view, would be significantly less than £42.65. Not only do the fees proposed not reflect the complexity of appellate work, we do not believe that they offer an economically viable rate: revenue does not necessarily equate to profit.

**Solicitor advocates**
Solicitor advocates and advocates are both considered as counsel for HCJ appeals currently. Under the regulations currently before the Committee, where sanction for counsel is granted for SAC appeals in more complex and novel cases, only advocates will be able to appear. This is the effect of Regulation 2(1) of the Criminal Legal Aid (Scotland) Regulations 1996, which the Scottish Government has the power to amend through the regulations currently before the Justice Committee. Solicitor advocates can appear as solicitors in the SAC, but in more complex and novel cases, they cannot be sanctioned as counsel and cannot employ the advocacy, expertise and skill which they currently provide at the HCJ. We believe that the 1996 regulations, as currently drafted, create an arbitrary barrier to open competition and undermine the client's ability to choose their own representative.

**Transition period and flexible approach**
SLAB published *Sheriff Appeal Court information* on 4 September, announcing its transitional and flexible approach to SAC work. The first element is sanction for counsel: "most applications for sanction for an appeal against conviction during the transitional period will be granted, where the solicitor has no experience of conducting criminal appeals." The aim of the 2014 Act was to create a new judicial tier, ensuring that cases are dealt with at the most appropriate level and by the most appropriate people. It is unclear how this 'experience' test would apply and this liberal approach to sanction simply masks the fact that the rates available for solicitors, who would otherwise have to conduct this work, are wholly inadequate.

The second step is flexibility around preparation fees: "During the transitional period, allowance would also be made for solicitors who haven't previously done the preparation work for summary appeals against conviction to ensure any reasonable additional preparation time required was allowed in the fees submitted." However

flexible around preparation fees, and we have now seen SLAB's specimen accounts, these fees are not viable to run a business in 2015.

**Access to justice**
The appeals process is complex and has a number of strict timescales, including seven days following conviction or sentence within which to make an appeal. It will be difficult for appellants to find a solicitor to undertake this work within such a period. Appeal work is demanding for professional representatives, and would be far more onerous for unrepresented appellants. In our opinion, it will also be challenging for appellants in rural areas: because the court is based in Edinburgh; because there are few solicitors who will undertake this work at these rates, and few solicitors in more rural areas in any event; because legal aid rates for travel are uneconomic for rural firms; and because the opportunity to fee share between a rural practitioner and an Edinburgh agent is unlikely with the low rates available.

In short, these regulations will make appeal work unviable for solicitors to conduct. For such complex work with such significant consequences for appellants' liberty and livelihood, we cannot support these regulations and have asked the government to reconsider. If it would assist the committee, we would be willing and available to provide oral evidence.

Andrew Alexander
Access to Justice
11 September 2015

## WRITTEN SUBMISSION FROM THE SOCIETY OF SOLICITOR ADVOCATES

The Society of Solicitor Advocates represents the interests of Solicitor Advocates throughout Scotland. Solicitor Advocates (Crime) have extended Rights of Audience in the High Court of Justiciary, Court of Criminal Appeal and Supreme Court. A number of Solicitor Advocates appear very regularly in the Court of Criminal Appeal, representing individuals in relation to both conviction and sentence Appeals from the Justice of the Peace Court, Sheriff Court and High Court. A significant number of Solicitor Advocates have considerable experience in representing members of the public in their Appeals against conviction and sentence. Appeals against sentence and conviction can be very complex and difficult requiring significant skill and expertise. The new regulations do not recognise that skill and expertise.

The Scottish Civil Courts Review and the Scottish Parliament's proceedings in relation to the Courts Reform (Scotland) Act must be considered given that there was no indication that it was intended solicitor advocates were to be placed in a disadvantageous position compared to members of the faculty of advocates or that it be intended that litigants in the sheriff court, requiring the services of specialist pleaders, should be restricted to instructing members of the bar. There is of course no such indication.

On the contrary the Act contains section 102B which sets out the circumstances in which the sheriff or the sheriff appeal court can sanction the employment of counsel, including solicitor advocates. The principle behind this provision was extensively debated both in the Justice Committee at Stage 2 and in the full Parliament at Stage

3 of the Bill. Section 102B of course applies to civil cases. However, this cannot justify an alternative approach in criminal cases just because the decision whether to sanction the use of specialist pleaders lies with SLAB rather than the court.

Allowing solicitor advocates to be treated as counsel in criminal cases in the sheriff court would be entirely cost neutral to SLAB. SLAB would have to apply exactly the same criteria to the case as they would if the choice was restricted to members of the bar. Indeed often when an application for sanction is made, it may not have been determined who the representative will ultimately be.

It is also worth considering the history and context of the original rule and comparing that with the current situation. The origins of the present version of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 lie in the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 1994 (SI1994/1019). The first solicitor advocates had just been admitted. So far as the criminal practitioners were concerned, they were all very senior sheriff court pleaders with extensive experience of conducting solemn procedure cases in the sheriff court. There was no intention to permit them to charge differently for the work they were already carrying out. Fast forward to the present situation and it is entirely different. A whole new tranche of work which has hitherto required the instruction of solicitor advocates or members of the bar in the High Court is now to be conducted in the sheriff appeal court. The effect of the rule as it stands is to reverse the approach taken in 1994 by forcing practitioners, but only solicitor advocates, to charge differently for the work they are carrying out. It is completely indefensible to make solicitor advocates but not advocates change the basis on which they can charge for conducting appeals when the use of counsel has been sanctioned.

The answer is therefore for these present draft regulations to contain an additional amendment to the 1989 regulations by adding in regulation 2(1), at the end of the definition of “solicitor-advocate” the words “or who, having such a right of audience, has conducted proceedings in the Sheriff Appeal Court;”.

As an example, the decision was published very recently in the case of Carmichael v Procurator Fiscal Airdrie [2015] HCJAC 81. The appellant was represented in this summary appeal by Gordon Jackson QC. That case at present could be conducted by a solicitor advocate QC such as Murray Macara QC and he would attract exactly the same fee as Gordon Jackson. Under the regulations as presently proposed, and assuming sanction for senior counsel had been granted, Gordon Jackson could earn a fee of £880.50 (exclusive of VAT). A solicitor Advocate QC might be paid around £100

The Society of Solicitor Advocates believe that the regulations would have a significant negative impact upon:

1. Members of the Public gaining access to Justice.
2. The right of choice of representation in the Sheriff Appeal Court.

**Access to justice**

If the Regulations are passed the Society of Solicitor Advocates consider that the number of Solicitors who currently conduct Summary Appeal work will dramatically

reduce. The impact of the regulations relate to funding for this type of work and access to experienced Appeal Court Lawyers. The funding suggested is at a level which was set in 1992. The proposal for funding the representation of individuals in the Sheriff Appeal Court is inadequate. It would not be economically viable for Solicitors to carry out what is complex and difficult work at such a low funding level.

In addition, this will lead to an inequality of arms. These appeals are going to be dealt with by Crown Office in Edinburgh instructing advocates depute. They are not going to be dealt with by the local procurators fiscal who conducted the trials. Appellants should be entitled to be represented by persons with equivalent skill and experience. Moreover, the benches of judges who will hear these appeals will be staffed by sheriffs who have been sitting as temporary judges to hear the appeals in the High Court.

There is a body of counsel, including solicitor advocates, which has developed the relevant skills and experience to prepare and present these cases effectively and efficiently. It is not in the interests of the administration of justice that the standard of representation is reduced.

**Choice of representation**

As a consequence of the regulations if sanction were to be granted for the employment of Counsel in the Sheriff Appeal Court, Solicitor Advocates could not be instructed. The consequence of the regulations would be that members of the public would lose their right to choose a Solicitor Advocate to act for them as Counsel in the Sheriff Appeal Court. Although sanction for a second Solicitor could be granted and a Solicitor Advocate instructed, the fee levels are such that our members would be unable to economically take on such instructions due to the level of fees. As a consequence the public will lose the opportunity of instructing many experienced and skilful Solicitor Advocates who have been appearing in the Criminal Appeal Court for many years seeking to overturn miscarriages of justice.

**Alternatives to the suggested fee structure**

1. The Society of Solicitor Advocates would recommend that a block fee system be introduced for Summary Appeal work similar to the current system provided to Counsel representing Appellants in the Court of Criminal Appeal. Clearly a system would have to be adopted to permit Solicitors from out with Edinburgh conducting appeals and therefore a travel allowance would require to be added to the fee structure.

Realistic Fees should be paid for what is complicated and difficult work. The impact of a conviction or a sentence (which is deemed to be a miscarriage of justice) can be extraordinary and as a consequence the Society of Solicitor Advocates believes there should be a realistic and robust fee structure to allow such individuals to challenge convictions and sentences being represented by lawyers with the appropriate skill and expertise.

2. The Society of Solicitor Advocates suggests that if sanction for Counsel is granted that sanction must allow members of the public to instruct Solicitor

Advocates as Counsel in the Sheriff Appeal Court and the Solicitor Advocates must be paid in a fee structure identical to members of the Faculty of Advocates who have been instructed as Counsel.

In short, the Society of Solicitor Advocates opposes the Fee Regulations. It believes the Regulations are unrealistic and will have a significant impact upon access to justice, the administration of justice and choice of representation.

Society of Solicitor Advocates
7 September 2015

## SUPPLEMENTARY WRITTEN SUBMISSION FROM THE SOCIETY OF SOLICITOR ADVOCATES

The Society of Solicitor Advocates (SSA) believe that the regulations would have a significant negative impact upon:
1. Members of the Public gaining access to Justice.
2. The right of choice of representation in the Sheriff Appeal Court.

(A) The Scottish Legal Aid Board (SLAB) issued 5 accounts of expenses which were drafted as scenarios of differing appeals. These have been analysed by the SSA. The accounts contain errors and are unrealistic.

1. Each account commences with a meeting with the appellant, yet that is included in the original lower court legal aid work and is not chargeable in an appeal.
2. The accounts include lengthy meetings with the appellant and are of such length that SLAB would in almost every scenario abate (refuse to pay) the meetings. Indeed in one account it is suggested that the appellant and the solicitor meet for 5 hours and 40 minutes which, firstly, would never happen and, secondly, would never be paid by SLAB.

3. In the scenarios the preparation for the appeal hearings include
(i) reference to work already carried out in the account, such as considering the stated case. That is double charging and will not be paid by SLAB.
(ii) Revising notes of evidence would never be paid as part of preparation. That is part of the original trial process and therefore double charging.
(iii) Preparing a written case and argument, these are not prepared in stated case appeals so that would not be paid
(iv) Considering (collating) authorities - the payment of considering legal authorities is never paid by SLAB in preparation( relevant legal knowledge is presumed by SLAB unless the matter relates to an extremely complex and novel area of law).
(v) The accounts include perusal of letters. That is not a chargeable item and is always abated.

The purported accounts appear to have been prepared hastily and with every conceivable charge (indeed many inconceivable ones too) that can be inserted, regardless of whether they would be paid or not. The SSA do not consider that these accounts are realistic. Indeed the SSA believe they are misleading, and they should be ignored. It seems clear that short-term contingency arrangements may be put in

place, allowing to some extent for a different approach to be taken than happens at the moment. Nonetheless, it is clear also that such an approach is transitional only, with no indication as to how long it might last. The suggestion that advocates will be sanctioned in conviction appeals if solicitors are insufficiently experienced is a major departure from normal practice. It confounds the idea of solicitors becoming experienced in this area of appeal work.

(B) The Minister appeared to think that solicitors should be able to accommodate this new work at current rates, failing to acknowledge that this work has never been contemplated as part of what would be covered by those rates. The block fee system is one imposed on the profession as it saved money. Payment for work actually and reasonably done is a fine principle but the current rates do not allow for adequate payment for a complex and demanding area of practice. The proposals also fail completely to reflect the way the Appeal Court has worked in its use of written submissions. That has been the main reason that sentence appeals are set down for 20 minute hearings, and can usually be dealt with in that time. Paying framing charges for such important documents as written submissions demonstrates the failure to give proper consideration to this aspect of the court reforms, although it matches the failure in the whole Court Reform process to give it sufficient thought.

(C) The regulations will prevent Solicitor Advocates from conducting appeals. Although the Legal Aid cost of appeals is relatively small (under 1%) the cost of conviction to an innocent person can be catastrophic. Miscarriages of Justice lead to loss of employment, loss of family homes, public humiliation and significant financial impact. The majority of summary appeals are conducted by Solicitor Advocates. The loss of that expertise will impact upon the ability of victims of miscarriages of justice to be represented by specialist pleaders experienced in all aspects of appeal work. The regulations will have a significant impact on Solicitor Advocates who carry out this type of work. The SSA consider that the regulations should be altered, not only in payment of solicitors at a realistic rate, not the 1992 rate, but that Solicitor Advocates must be designed as ‘counsel’ for the purposes of these regulations as they are in civil Sheriff court cases. The Sheriff Appeal court is a new court and therefore there is no precedent or good reason to prevent this.

While the point may be reached when solicitors do most of these cases, the profession is neither willing nor able to do so at the moment. The SSA has assisted the Law Society in providing training to solicitors for conducting appeals but that has been restricted to a very small percentage of the profession thus far. Solicitor advocates are far better placed than advocates to be able to assist with the transition. They are solicitors as well as specialist pleaders. They have far greater experience of the Sheriff Court and summary procedure.

(D) The presumption by the Scottish Government and SLAB is that solicitors will leave their home court to attend Edinburgh for the appeal hearings. That will not happen (not just as a result of the ludicrous payment scheme). Appeal hearings are fixed without consultation with the solicitor. That solicitor may have local commitments such as being the duty solicitor, the police station duty solicitor (which can involve overnight attendance for police interviews), undertaking a Sheriff and Jury trial or summary trials. If a solicitor is the duty solicitor or the police station duty or is in a 2 week Sheriff and jury sitting, it will be impossible for him to attend the

appeal court. Given the feeling of solicitors throughout Scotland, the SSA firmly believes it would be impossible for a solicitor to instruct another solicitor to conduct an Appeal hearing for £27.40. Regardless of the opinion of the Scottish Government or SLAB these fee regulations will never work. As a result, it makes no sense, both financially and professionally, for a solicitor to take instructions in an appeal when the solicitor may be unable to attend the appeal or arrange for another solicitor to carry out the appeal on his behalf. Non-attendance in any court for a hearing is potentially contempt of court. That risk is real. Solicitors will not take that risk.

(E) The current arrangement with Solicitor Advocates taking instruction for appeals and conducting the majority of them, works efficiently and effectively. Solicitors do not have the risk of contempt. The appellant's are represented. The Appeal Court process is not delayed. Justice is delivered efficiently and effectively. The new fee regime will not result in that.

Society of Solicitor Advocates
14 September 2015

## WRITTEN SUBMISSION FROM THE GLASGOW BAR ASSOCIATION

The Glasgow Bar Association ("the GBA") was formed in 1959. The objects of the Association, as contained in its constitution, include the promotion of access to legal services and access to justice and to consider and, if necessary, formulate proposals and initiate action for law reform and to consider and monitor proposals made by other bodies for law reform. The GBA also offers legal education programmes and sponsors and supports legal education and debate at Scotland's Universities

Today the GBA remains a strong, independent body. Its current member levels sit at around four hundred, by far the largest Bar Association in the country. The GBA would encourage the Justice Committee to continue to seek its views on all legislative matters.

In summary the Glasgow Bar Association wishes to express its deep concern in relation to the level of payment to be made to those providing legal assistance and representation to appellants appearing in the new Sheriff Appeal Court.

It is the view of our membership that the level of fees proposed are wholly inadequate, significantly undervalue the important and challenging work involved in preparing and presenting summary criminal appeals. The overarching concern is that the proposed fee structure presents a very real risk of impeding access to justice for those appellants who wish to secure legal representation to present their case.

### Background

The rationale behind the setting up of the new Sheriff Appeal Court was in order to help local summary justice. The driver behind the creation of the Sheriff Appeal Court was better use of judicial time and it was intended to be cost neutral.

Despite early plans it is understood there will only be a Sheriff Appeal Court in Edinburgh which will deal with all Summary Appeals against conviction and

sentence. The decision not have more than one Sheriff Appeal court is something that is at odds with the initial objectives. There should be additional courts established in specific areas of the country. For example, a court in the north (Dundee/Aberdeen/Inverness), one in the south (Borders), one in the east (Edinburgh) and one in the west (Glasgow).

The decision not to have a court in Glasgow is difficult to understand given the jurisdiction deals with the largest volume of summary criminal work in the country. It is also bordered by busy courts such as Hamilton, Paisley, Greenock and Kilmarnock.

It is further understood that the court will sit in the Lawnmarket (High Court building).

The Crown intend using very experienced prosecutors to appear in the court. These will be Advocate Deputes (who have rights of audience in the High Court) as opposed to Procurator Fiscal Deputes who ordinarily only have the right to appear in the Sheriff Court.

Sheriffs who have been appointed to the Sheriff Appeal Court are all very experienced Sheriffs, the vast majority are also part-time High Court Judges and some have experience in sitting in the current Court of Criminal Appeal.

The decisions of the Sheriff Appeal Court will be binding upon any sheriff or justice of the peace : so developing a body of national case law covering all sheriffdoms . It is clear that the procedure currently in place whereby sentence appeals are heard by a bench of two judges and conviction appeals by a bench of three will continue unchanged .Indeed it has been recognised by Sheriff Principal Stephen QC , President of the Sheriff Appeal Court , that in this solicitors will have “the opportunity of extending their skills to appearing before a triple bench in the Sheriff Appeal Court “. These skills are ones which are widely recognised to be a specialised area of pleading and which are currently carried out by Counsel and a relatively small group of Solicitor Advocates who undertake appeal work on behalf of a very significant number of legal firms in Scotland. In terms of the Regulations being considered sanction for the instruction of counsel will not be automatic in the Sheriff Appeal court. It is not anticipated that such sanction will be regularly granted. As the committee is aware under the existing legal aid regulations solicitor advocates are excluded from the definition of “ counsel” unless they are exercising extended rights of audience in the High Court. Accordingly it is now envisaged that solicitors will carry out the same work currently performed by counsel and solicitor advocates in the High Court for a level of payment which is very significantly less than that currently being paid. As an illustration of this in terms of the proposed regulations a half hour hearing in respect of an appeal against sentence will attract a payment of £27.40 ( under the existing regulations £171.10). In terms of an appeal against conviction a hearing lasting one hour under the proposed payment structure would attract a fee of £54.80 ( as contrasted with the existing payment of £292.20) It is submitted that such a level of payment for solicitors is quite simply unworkable and will lead to a situation whereby appellants will find it extremely difficult to secure legal representation for their appeal .

**Current situation**

To appear before the Appeal Court requires considerable preparation. Written Case and Argument in Summary Appeals against sentence require to be prepared and lodged in advance (currently for a fee of £100). Conducting the Appeal against sentence itself involves careful preparation and submissions that a Sheriff erred in the exercise of his/her discretion. It is a specialised form of pleading and is very different from the business solicitors are used to conducting in the Sheriff Court on a day to day basis. Currently payment for an Appeal against sentence is £150 for Counsel. Counsel also has the option of preparing an opinion if required (£75) and having a consultation prior to the hearing if necessary (£184).

Accordingly, Counsel or Solicitor Advocate who has been instructed in a sentence Appeal will earn fees of approximately £509.

Convictions Appeals attract a higher rate. Drafting a Bill of Suspension, Bill of Advocation or application for Stated Case can be charged at £82 to £200. An opinion can be prepared for the fee of £125 and the fee for appearing at any such hearing is £250. Further, a consultation can be undertaken if necessary for a fee of £184. Thus, if the minimum fee is charged for drafting of the Bill or Stated Case, Counsel will currently be paid up to approximately £644.

Further, a solicitor will be able to charge normal rates for waiting behind Counsel to attend at the hearing or any consultation. There will also be a travel charge if attending from outside Edinburgh. Significantly, however, that solicitor is not ultimately responsible for preparing and presenting the Appeal at the moment.

It should be made clear that under the present regime two fees are payable. One to the instructed solicitor and one to the Advocate/ Solicitor Advocate who presents the appeal. At present the instructed solicitor would attend the hearing and charge a fee for doing so. The Advocate/Solicitor Advocate would charge a separate free for their involvement. Under the new structure there will be an immediate saving as there will no longer be two people being paid. It will only be one (the solicitor).

**Proposed changes**

The proposed changes mean that a solicitor will be responsible for all work in connection with preparing and conducting Appeal Hearings. In reality each Appeal will involve significant preparation both to draft the Case and Argument (or application for Stated Case, Bill of Advocation or Bill of Suspension) and to conduct the hearing. Preparing for an Appeal against conviction in reality involves multiple hours of preparation and can involve onerous legal research.

As envisaged by the Law Society in their update of June 2015, SLAB are likely to abate preparation fees and thus the sum of £10.55 per quarter is wholly insufficient for the work involved.

Only a “framing formal documents” fee would be allowed for the drafting of a Written Case and Argument or to draft a Bill of Suspension, Bill of Advocation or an application for Stated Case. This is wholly inadequate for the work involved in

preparing and drafting what are often fairly lengthy documents which are routinely scrutinised by the court. This is particularly so in Appeals against conviction where often it is difficult to know which method of Appeal is appropriate and the importance of accurate and careful drafting cannot be understated.

The rate for framing formal documents is currently £6.00 per sheet the same as the rate which is payable per page for detailed letter to client. Thus an average payment for drafting such important documents will be less than £12.

The fee for actually appearing in the Appeal Court is also wholly inadequate. Most actual Appeal Hearings at present for Summary Sentence Appeals last about 20 minutes. This is, however, 20 minutes of being on your feet presenting the Appeal alone and being questioned by the Bench and cannot be equated to appearing in a hearing such as a DTTO review or a CPO review in the Sheriff Court at present.

It is likely that the vast majority of Summary Sentence Appeals will not last more than half an hour and thus payment will be £27.40. This is significantly less than, for example, the fixed fee payable to conduct a Special Reasons Proof in the Justice of the Peace Court which is currently £100 .

As far as Appeals against conviction are concerned the inadequacy of the rates are even clearer. These normally last anything from 20 minutes to over an hour. They involve detailed legal argument challenging a Sheriff's decision on the law. Even if the hearing goes passed the first 30 minutes the fee will only be £54.80 for up to the first hour.

Preparation time and meeting client can now also be conjoined since November 2014 in summary time and line cases and this will have the effect of reducing the fee payable even further.

It appears from discussion with members of the various Bar Associations, both those who are experienced in the Appeal Court and those who are not, that there is little if any appetite to appear in the Sheriff Appeal Court at proposed payment levels.

Indeed there has not been a single member of our association who has stated an intention to carry out the work at the fee levels proposed.

To propose the same fees as currently are payable for Sheriff Court summary time and line cases is frankly unacceptable. The day to day hearings in the Sheriff Court for Drug Treatment and Testing Orders and Community Payback Order reviews etc cannot be compared to what appearing in the Appeal Court will involve.

There will be in reality little practical difference between the new Sheriff Appeal Court and the current Court of Appeal.

**Particular issues for solicitors based outwith Edinburgh**

Solicitors based out of Edinburgh will have a huge problem. This would be particularly so for sole practitioners. Such solicitors would be very unlikely to travel to Edinburgh to conduct an Appeal leaving a day's business at their local court.

Edinburgh Solicitors would be even less likely to want to appear on an agency basis for a proportion of what already an inappropriately low fee.

This could mean an Edinburgh Solicitor being asked to appear in the Sheriff Appeal Court for less than £20 payment. It is very unlikely that any solicitor would be willing to do this.

This raises concerns about access to justice and could lead to solicitors (particularly those based outside Edinburgh) refusing to take on Appeal work which would have the effect of increased party Appellants which is undesirable for the efficient running of the Appeal Court.

**Proposals**

The Glasgow Bar Association proposes that the block fee for conducting a hearing in an Appeal against sentence and Appeal against conviction should remain at £150 and £250 respectively. The Association also proposes that the block fee for preparing a written Case and Argument remains at £100 and that the fee for drafting a Bill of Suspension or Bill of Advocation or an application for Stated Case is set at £100 (the lower end of the scale of fees currently available).

Meetings with client could be charged on a time and line basis at £10.55 per quarter. Travel could be paid at rates currently fixed to encourage solicitors outwith Edinburgh to take on and conduct Appeal work in Edinburgh. This would go some way to alleviating concerns about access to justice.

The above proposals would still result in significant savings. There would no longer be a fee payable for preparing an opinion and consultations would revert to meetings charged at time and line basis and so savings would be made there. In addition only one solicitor would be paid for this work and not, as things currently stand, a Solicitor Advocate or Counsel and a solicitor.

The Glasgow Bar Association feels that the above proposals are reasonable and reflect the fact that to appear in the Appeal Court will be an onerous and significant task and thus should be paid appropriately. The proposals would also encourage solicitors to continue to be prepared to take on appeal work.

**Equality of Arms**

It is fundamental that access to justice be available to all.
The proposed fee regime would lead to a reduction in access to justice.

The set up of the court will mean that a person who wishes to appeal a Summary sentence or conviction will enter a forum where the Crown are represented by experienced, specialist solicitors (Advocate Deputes). The bench is comprised of highly experienced, specialist Sheriffs. Many of whom were previously QCs and many of whom are temporary High Court Judges as well as sitting as Sheriffs.

The appellant will no longer be allowed funding to have an instructed solicitor and a specialist Appeal Advocate or Solicitor Advocate. Instead they will require to instruct a solicitor without the specialist knowledge of appeal work who will be paid at a fee rate first introduced in 1992. Some 23 years ago.

The appellant should be allowed to challenge a decision made against him or her by the State on an equal footing.

**1992 fee structure**

The fee structure being utilised to fund representation before the Sheriff Appeal Court was first introduced in 1992. The Glasgow Bar Association asks members of the committee to consider whether there is any other profession or walk of life where a funding regime would be allowed to be set at a rate from 1992. Why is this even thought to be appropriate?

1992: average house price £68,000
2015: average house price £165,000
1992: Pint of milk 30p
2015: Pint of milk 80p

1992: Pint of beer £1.29
2015: Pint of beer£3.31

1992: Mars bar 15p
2015: Mars Bar 51p

1992: Litre of Petrol 40p.
2015: Litre of petrol £1.30

1992: average UK salary £20,200
2015: average UK salary £31,000

**Rich v poor**

The fees proposed for the new Sheriff Appeal court risks a situation where justice is only available to the rich and the poor have access to justice removed.

A situation may arise where legally aided appeal work is so poorly paid that people seeking to appeal will be unable to locate a solicitor willing to carry out the work under the legal aid scheme. They would then have to abandon the appeal or conduct the appeal hearing on their own.

On the other hand people with access to their own funds would be able to instruct a solicitor to carry out the work privately.

Those with money can appeal but those without cannot.

**Party litigants**

The Sheriff Appeal court will be unable to function smoothly if a large number of appellants cannot obtain the services of a solicitor under the legal aid scheme and have to venture into the new court unrepresented and attempt to present their own appeals. We wonder how this will be viewed by Sheriffs who face numerous unrepresented accused day after day.

In order to ensure the efficient running of the new court those solicitors who appear there must be paid an appropriate fee to carry out the work.

The Glasgow Bar Association is concerned that carrying out work in the Sheriff Appeal court under the fee structure suggested is untenable. Those carrying out criminal legal aid work in Scotland have seen their businesses crippled by cuts and lack of investment over many years.

As an Association representing almost 400 Scottish solicitors we are more than happy to engage in any meaningful discussion or communication with the Scottish Government and The Scottish Legal Aid Board with a view to designing a system that ensures appropriate payment for work carried out and in turn protects access to justice for the individuals seeking the assistance of a solicitor under the legal aid scheme.

Ross Yuill
President
The Glasgow Bar Association
9 September 2015

## WRITTEN SUBMISSION FROM ANN OGG, SOLICITOR ADVOCATE

1. The new Sheriff Appeal Court will deal with all summary conviction and sentence appeals. They will also deal with Bills of Suspension and Advocation in respect of summary procedure and appeals in terms of section 174 of the Criminal Procedure (Sc) Act 1995 (the 1995 Act). No changes have been made to the provisions in the 1995 Act and the Act of Adjournal which deal with summary appeal procedure. This means that the existing practices and procedures require to be adhered to. At the moment counsel or solicitor advocates are involved from an early stage and can ensure that documents drafted meet the requirements of the legislation and the guidelines issued by the court. Those requirements are exacting. At each stage in appeals against sentence and conviction and in relation to Bills of Suspension and Advocation the Appeal Court has repeatedly stressed the necessity of adherence to the legislation and practice. Appeal Court practice and pleading is entirely different from that used in courts of first instance.

2. At the moment the presentation of a summary appeal against sentence or conviction is done by counsel or a solicitor advocate. The solicitor in most cases drafts grounds of appeal against sentence and sometimes conviction but thereafter all documents are usually drafted by counsel or solicitor advocate and the presentation of the appeal is done by them. It is necessary also to explain the role of “Edinburgh agents”. The Appeal Court sits in Edinburgh and the administration of the

court is dealt with by Justiciary Office which also is based in Edinburgh. Many documents require to be lodged or uplifted at or from Justiciary Office. Solicitors outwith Edinburgh are unable to attend to do this and Edinburgh solicitors carry out that work on their behalf. In addition they also attend the Appeal Court with counsel or solicitor advocates.

3. Under the new procedure it will no longer be possible for solicitor advocates to appear before the Sheriff Appeal Court. The Scottish Legal Aid Board take the view that as a solicitor advocate is someone who has an extended right of audience to appear in the High Court this does not cover the new Sheriff Appeal Court. This view appears to be shared by the Scottish Government. For the reasons outlined later in this note I consider that their interpretation is wrong and that there is also an issue about their interpretation of the Competition Commission's Code. It is anticipated sanction for counsel will only be available in rare cases although initially SLAB appears has indicated that sanction will be granted for counsel (but not solicitor advocates). The Scottish Government's idea is that solicitors will be responsible for the preparation and presentation of summary appeals against sentence and conviction.

4. The current procedure and documents prepared in respect of appeals are set out below. I have at the end of each section commented on the impact the new fee structure will have.

**a) Appeals v Sentence**

i) Note of Appeal against sentence – An appeal against sentence commences with the lodging of this document. The grounds of appeal must be stated with sufficient specification to identify the particular criticism of the sentence being challenged (McCluskey Criminal Appeals para 2.27). If not then the appeal will not succeed. Normally the Note of Appeal is drafted and lodged by the Appellant's solicitor although in many cases counsel or a solicitor advocate is consulted. It requires to be lodged at the local Justice of the Peace or Sheriff Court. The papers are sent to Justiciary office and the Justice or Sheriff prepares a report for the Appeal Court setting out the reasons for the sentence imposed and dealing with the grounds of appeal. Once this is done the appeal is then sifted by a single judge.

ii) Application to the second sift if leave to appeal is refused at first sift - The current practice is for counsel / solicitor advocate to prepare an opinion on the merits of the appeal advancing any arguments supporting an appeal to the second sift. That opinion is then submitted with the letter appealing against the refusal of leave to appeal. The fact that an opinion of counsel / solicitor advocate referring to authority supports an appeal can have a significant impact on whether the appeal passes the sift.

iii) An application in terms of section 187(7) of the 1995 Act can be made to argue any grounds of appeal that have been refused at the second sift. The Appeal Court has held that for such an application to succeed it must be shown that the second sift judges erred in some way or there was a change in circumstances. The initial application is made by letter and there then is a hearing before 2 judges conducted by counsel or a solicitor advocate on the application.

iv) Written submissions – if leave to appeal is granted the written submissions require to be lodged 14 days in advance of the appeal hearing. They currently must be prepared by counsel or solicitor advocate conducting the appeal. They are not a rehearsal of the grounds of appeal but should set out the arguments to be presented to the Appeal Court. In preparing the submissions reference is made to the Sheriff's report and the approach taken by him to sentencing, the reasons the selected sentence was imposed, consideration of any other court documents such as criminal justice social work reports and any case law in support of the arguments advanced. The written submissions give the court advance notice of the arguments and have resulted in court time being shortened.

iv) Appeal hearing – a number of cases are set down for the Appeal Court. In some cases if the Appellant is in custody there may be a video link but if an Appellant had been granted interim liberation he should attend court. In other cases the Appellant need not be present. At the appeal hearing there is opportunity to expand on what is said in the submissions and for the Appeal Court to raise issues of concern. Most appeals against sentence last approximately 30 minutes but if legal issues are involved they can take considerably longer. The appeal hearing does not consist of a rehearsal of the plea in mitigation it is necessary to show in what way the Sheriff or Justice of the Peace erred in imposing the sentence he did. A decision is usually given at the hearing but the court can make avizandum which means the decision will be issued at a later date which occasionally results in a further court appearance. The Appeal Court proceeds through the roll commencing at 10.30am and the court will rise at 4pm.

*The impact of the new fee structure*

The solicitor will now be responsible for drafting and lodging all documents for the appeal against sentence. The solicitor will require to draft the Note of Appeal against Sentence and any letter to the second sift. He / she will not be able to provide an opinion as they are not either counsel or solicitor advocate. The solicitor will also have to prepare the written submissions for the Appeal Court. I understand that there is no figure allowed for preparation of the documents or time spent researching any law. The figure for drafting the note of appeal against sentence, any letter to the second sift and the written submissions is approximately £6 per page. A letter or written submissions may take hours of preparation and drafting but no fee is allowed for that.

In respect of the Appeal hearing the Sheriff Appeal Court is to sit in Edinburgh. Solicitors will be expected to attend and present the appeals. Their court time actually presenting the appeal will is to be paid at £27.40 per half hour and it is understood they will receive some waiting time and travel. If an appeal against sentence calls at 10.30 a solicitor will receive £27.40 for presenting an appeal to the second highest Appeal Court in Scotland. The fee will be more (but not much) if the solicitor has to wait for the calling of the case.

**b) Appeals v Conviction**

i) Application for Stated Case – an appeal against conviction commences with the lodging of this document. It is sometimes drafted by the solicitor, sometimes by counsel or solicitor advocate and sometimes by both. As with Notes of Appeal against sentence it must contain sufficient specification to identify the particular criticism of the conviction being challenged. The Justice of the Peace or the Sheriff then states a case. The Stated Case is not a straightforward document. The Justice or Sheriff is required to set out the charges, the evidence, rehearse any arguments regarding legal points which are the subject of appeal and deal with the grounds of appeal. The Justice or Sheriff must also set out findings in fact and questions in law for the Appeal Court. The draft Stated Case is then sent to parties and time is allowed for parties to propose adjustments.

ii) Adjustment of the Stated Case – each party can propose adjustments in writing. The purpose of adjustments is to ensure that the stated case rehearses the evidence led, deals with the issues under appeal and is in the correct format for the Appeal Court. It is also possible at this stage to lodge further grounds of appeal. A hearing is then held where the Justice or Sheriff considers the adjustments in the presence of parties and can accept or reject them. The Justice or Sheriff then prepares an note of any rejected adjustments and this is appended to the Stated Case. The Appeal Court at a later date can take account of rejected adjustments. The form of the Stated Case is of importance particularly for an Appellant. The Appeal Court recently made it clear that the questions in law must reflect the grounds of appeal and if they do not then no matter what the Note of Appeal says that point cannot be argued. The findings in fact set out the evidence on which the conviction was based. If a finding in fact is not challenged in the questions in law that too will prejudice the appeal at a later date. Adjustments should also be proposed to notes of the evidence which the Justice or Sheriff has set out if this is challenged. Many solicitors currently involve counsel and solicitor advocates at this stage because of the complexity and the possible repercussions before the Appeal Court at a later stage. Papers are then sent to Justiciary Office by the lower court and the appeal is sent to the first sift.

iii) Application to the second sift if leave to appeal is refused at the first sift - The current practice in almost all cases is for counsel / solicitor advocate to prepare an opinion on the merits of the appeal advancing any arguments supporting an appeal to the second sift. Reference will be made to the Stated Case and its component parts particularly findings in fact and questions in law and case law will be referred to. That opinion is then submitted with the letter appealing against the refusal of leave to appeal. The fact that an opinion of counsel / solicitor advocate referring to authority supports an appeal can have a significant impact on whether the appeal passes the sift.

iii) Thereafter an application in terms of section 187(7) of the 1995 Act can be made to argue any grounds of appeal that have been refused at the second sift as in sentence appeals. For such an application to succeed it must be shown that the second sift erred in some way or there has been a change in circumstances. The initial application is made by letter and there then is a hearing before 3 judges on the application.

iv) Appeal hearing – as with appeals against sentence a number of cases are set down for the Appeal Court. Prior to the appeal hearing the Edinburgh agents uplift the principal Stated Case, the other appeal papers at Justiciary Office and the lower court papers minutes also from Justiciary office and make up a "print" of the papers. This involves numbering the pages, preparing an index and a cover sheet. Ten copies are prepared of the print. Four copies are forwarded to Justiciary Office, three to Crown Office, one is given to counsel / solicitor advocate who is conducting the appeal and one to the local solicitor. Stated cases take on average about an hour but some take considerably longer. Submissions made are based on what is contained in the stated case and reference is made to the findings in fact, questions in law, notes of evidence, court minutes and the Justice or Sheriff's note regarding rejected adjustments. The Appeal Court usually delivers their decision at the hearing but the court can make avizandum which means the decision will be issued at a later date which occasionally results in a further court appearance. The Appeal Court proceeds through the roll commencing at 10.30am and the court will rise at 4pm.

*The impact of the new fee structure*

The solicitor will now be responsible for drafting and lodging all documents for the appeal against conviction. The solicitor will require to draft the application for stated case, any adjustments to the draft stated case and any letter of appeal to the second sift. They will not be able to provide an opinion as they are not either counsel or solicitor advocate. I understand that there is no figure allowed for preparation of the documents or time spent researching any law. As with appeals against sentence the figure for drafting the documents relating to the appeal is approximately £6 per page. An application for stated case or opinion to the second sift may take hours of preparation and drafting but no fee is allowed for that.

No fee is allowed for uplifting the papers from Justiciary Office or the preparation of the prints of the Stated Case. In respect of the Appeal hearing the Sheriff Appeal Court is to sit in Edinburgh. Solicitors will be expected to attend and present the appeals. Their court time is to be paid at £27.40 per half hour and it is understood they will receive some waiting time and travel. If an appeal against conviction calls at 10.30 and takes an hour to present a solicitor will receive £54.80 for presenting an appeal to the second highest Appeal Court in Scotland. The fee will be more (but not much) if the solicitor has to wait for the calling of the case.

**c) Bills of Advocation and Suspension**

i) Drafting of the Bills – these are usually drafted by counsel or solicitor advocate. Bills of Advocation and Suspension are split into three parts namely the prayer of the Bill, the Statement of Facts and the Pleas in Law. Advocation and Suspension are used to challenge procedural difficulties, issues such as oppressive conduct in the course of the proceedings and incidental matters such as warrants. They again can be lengthy and complicated documents. Once lodged a warrant for service is granted and the Bill will be served on the Crown. The Justice or Sheriff then prepares a report dealing with the issues in the Bill. There is no sifting procedure for Bills but the Crown can and do lodge Answers.

ii) Appeal hearing – this is conducted by counsel or solicitor advocate. The hearing again consists of a presentation of the issues referring to the Bill and the Justice or Sheriff's report. Prior to the appeal hearing the Edinburgh agents uplifts the Bill, Answers, Justice / Sheriff's Report and other appeal papers and the lower court papers from Justiciary office and make up a "print" of the papers. This involves numbering the pages, preparing an index and a cover sheet. Ten copies are prepared of the print. Four copies are forwarded to Justiciary Office, three to Crown Office, one is given to counsel / solicitor advocate who is conducting the appeal and one to the local solicitor. Bills of Advocation and Suspension take on average about an hour but some take considerably longer. Submissions made are based on what is contained in the Bill, the Justice / Sheriff's Report and any Answers. The Appeal Court usually delivers their decision at the hearing but the court can make avizandum which means the decision will be issued at a later date which occasionally results in a further court appearance. The Appeal Court proceeds through the roll commencing at 10.30am and the court will rise at 4pm.

The hearings are set down for an hour but can take considerably longer. The Appeal Court can deliver their decision that day or again make avizandum.

*The impact of the new fee structure*

The solicitor will now be responsible for drafting and lodging all Bills of Advocation and Suspension. They will not be able to provide an opinion as they are neither counsel nor solicitor advocate. I understand that there is no figure allowed for preparation of the documents or time spent researching any law. As with appeals against sentence and conviction the figure for drafting the Bills is approximately £6 per page. A Bill of Advocation or Suspension may take hours of preparation and drafting but no fee is allowed for that.

No fee is allowed for uplifting the papers from Justiciary Office or the preparation of the prints of the Bills. In respect of the Appeal hearing the Sheriff Appeal Court is to sit in Edinburgh. Solicitors will be expected to attend and present the appeals. Their court time is to be paid at £27.40 per half hour and it is understood they will receive some waiting time and travel. If a Bill of Advocation or Suspension calls at 10.30 and takes an hour to present a solicitor will receive £54.80 for presenting an appeal to the second highest Appeal Court in Scotland. The fee will be more (but not much) if the solicitor has to wait for the calling of the case.

5. It appears from the discussions to date that the Scottish Government and SLAB take the view that summary cases are of a trivial, non complicated nature and should be treated as minor matters and that appeals from these courts fall into the same category. It is of note that virtually all appeals against conviction and sentence concerning certain statutory offences including health and safety contraventions; offensive weapons; misuse of drugs; road traffic; child neglect; consumer credit; control of pollution; food and drugs, trade descriptions; licensing; vandalism; dangerous dogs and offences involving animals originated from prosecutions at summary level. These are not trivial matters. Preparation and presentation of such appeals is time consuming. There is no allowance whatsoever in the new fee structure for that.

6. It also fails to take account of the significant custodial sentence that can be imposed by the Sheriff Court namely 12 months imprisonment and fines up to £5000.

7. Many of the decisions of the Appeal court in summary cases are reported in the law reports as many raise points of law, some of which are more significant than others. Many cases have progressed to and been determined by benches of five judges or the Supreme Court or Privy Council. A number of summary cases have resulted in significant changes to the law of Scotland. There are many reported summary cases but examples of some of the more significant summary cases which highlight the wide range of legal matters dealt with by the Appeal Court are such as those detailed below namely -

a) Thompson v Crowe 1999 SCCR 1003 (5 judges) – procedure at a trial diet for determining admissibility of a statement given by an accused. This decision resulted in material changes to the conduct of both summary and solemn trials.

b) Starrs v Ruxton 1999 SCCR 1052 – whether bringing a prosecution before a temporary Sheriff was incompatible with an accused's ECHR rights.

c) Buchanan v McLean 2001 SCCR 475 (Privy Council) – whether fixed fees were incompatible with article 6(1) of ECHR

d) Stott v Brown 2001 SCCR 62 (Privy Council) – whether the use of an answer by an accused as evidence against him was incompatible with the accused's convention rights.

e) Smith v Donnelly 2001 SCCR 800 – whether breach of the peace was sufficiently defined as to be compatible with article 7 of the European Convention on Human Rights.

f) Millar v Dickson; Stewart v Heywood; Payne v Heywood; Tracey v Heywood 2001 SCCR 741 (Privy Council)– defective representation whether failure to object to a prosecution before a temporary Sheriff was incompatible with ECHR.

g) Clark v Kelly 2003 SCCR 194 (Privy Council) – whether the District Court practice of a clerk retiring with Justice to give advice on points of law was incompatible with article 6 of ECHR.

h) Jones and others v Carnegie 2004 SCCR 361 – whether a non violent sit down protest resulting in a conviction for breach of the peace was compatible with rights in terms of articles 10 and 11.

i) Goodson v Higson 2002 SCCR 88 – citizen's arrest

j) Webster v Dominick 2003 SCCR 525 (5 judges) – indecent conduct whether shameless indecency

k) Rankin v Murray 2004 SCCR 422 – whether wearing jewellery bearing initials of a proscribed organisation contravened Terrorism Act 2000.

l) McAdam v Urquhart 2004 SCCR 506 – GM crop protest and trespass with intent to obstruct lawful activity.

m) Gonshaw v Bamber 2004 SCCR 482 and 696 – criterion for deciding whether a no case to answer submission should be upheld and impact of accused thereafter giving evidence.

n) Fraser v Adams 2005 SCCR 54 – foxhunting and whether an activity for pest control was an offence.

o) McHale v Miller; McNaughton v Gilchrist and Dickson v HMA 2006 SCCR 637 – temporary Sheriffs and acquiescence.

p) Robertson v Frame, O'Dalaigh v Frame, Ruddy v Griffiths 2006 SCCR 151 – acquiescence regarding temporary sheriffs

q) McDonagh v Pattison 2007 SCCR 482 – whether a warrant granted on erroneous information is fundamentally null.

r) Fagan v Donaldson 2008 SCCR 648 – public indecency, lewd and libidinous behaviour and shameless indecency (5 judges)

s) Logan v Spiers 2008 SCCR 815 – whether Scottish Parliament could increase the penalty for an offence in a UK statute

t) Spiers v Ruddy 2008 SCCR 131 (Privy Council) – whether incompatible with an accused's rights to prosecute him after lapse of a reasonable time.

u) Robertson Petitioner; Gough v McFadyen 2008 SCCR 20 – contempt of court and ECHR

v) Thomson v Burns 2009 SCCR 597 – whether witness statements have to be disclosed in summary proceedings.

w) Walls v Brown 2009 SCCR 711 – whether a song sung at a football match was racially or religiously motivated.

x) Wilson v Harvie 2010 SCCR 388 – whether an increase in Sheriff's sentencing powers applicable to offences committed before legislation came into force and article 7 ECHR.

y) Gill v Thomson; Craig v Thomson; Montgomery v Thomson 2010 SCCR 922 – whether a custodial sentence is appropriate for social security fraud and guidelines as to length of sentences.

z) Hart v Brown; Robertson v Richardson 2012 SCCR Harkin v Brown; Fung v Richardson 2012 SCCR 617 (5 judges) – whether a discount for plea of guilty to penalty points and disqualification from driving is appropriate where a minimum sentence is prescribed.

aa) Ambrose v Harris 2011 SCCR 65 (Supreme Court) - whether statements in answer to police questioning admissible in evidence and incompatible with ECHR where accused not had prior legal advice.

bb) Pringle v Service 2011 SCCR 97 – application of doctrine of mutual corroboration where charges 12 years apart.

cc) McGowan v B 2012 SCCR 109 (Supreme Court) – statement given after waiver to legal advice and article 6 ECHR.

dd) Thompson v Dunn 2012 SCCR 298 – what amounts to indecent assault and the notification requirements of Sexual Offences Act 2003

ee) Paton v Dunn 2012 SCCR 441 – powers of search

ff) Mboma v Watson 2013 SCCR 355 – interpretation of Immigration and Asylum Act 1999 and international conventions.

gg) MacDonald v Cairns 2013 SCCR 422 – Offensive Behaviour at Football and Threatening Communication (Sc) Act 2012

hh) Paterson v Harvie (5 judges) – breach of the peace

8. It may be suggested by SLAB or the Scottish Government that cases of such significance will still make their way to the Sheriff Appeal Court as the legal points will be identified. With respect I would suggest that simply will not be the case. If solicitors are not able to conduct the appeal because appeal work is not financially viable and they are not prepared to carry out the work necessary to bring the appeal before the new appeal court the appeal will never get off the ground. A party Appellant cannot be expected to be aware of the legal points such as those raised in the cases above or to conduct arguments like those highlighted above.

9. The fee is derisory for appearing before the second highest appeal court in Scotland. A solicitor anywhere in Scotland will be significantly out of pocket if they were to undertake an appeal in a summary case. It will not even be financially viable for those based in Edinburgh to conduct such appeals. Solicitors will accordingly not undertake such work and the Appellants will have to represent themselves.

10. There is also the matter of the compatibility of the legislation with an Appellant's article 6 rights of the ECHR. The question the Privy Council asked in Buchanan v McLean 2001 SCCR 475, which considered fixed fees, was whether the effect of the regulations would create a real risk that an Appellant would be denied a fair trial because they were deprived of effective legal assistance which they were entitled to be given free under article 6(3)(c) of the ECHR. As article 6 applies equally to appeal proceedings there is certainly a strong argument that an Appellant would be deprived of fair proceedings without a solicitor. If solicitors are unable to undertake appeals then there will be no effective representation for the Appellant. In McLeod v Marshall 2013 SCCR (Sheriff Court) 271 the Sheriff upheld a compatibility minute regarding fixed fees which were woefully inadequate to cover diets dealing with preliminary pleas. As Lord Clyde stated in Buchanan "if the result of the regulations is that no

legal representative is available for an accused in a case where the Convention required that he be represented, then a breach will occur". Such a situation gives rise to a possibility of an inequality of arms and unfairness. That clearly will be the position with the current proposed fees.

11. I note in the Business Regulatory Impact Assessment it is suggested that, having considered the Competition and Markets Authority competition filter, the proposal will not impact on competition within the legal aid market. This is clearly not the case. As a result of the proposal solicitor advocates are excluded from appearing in that capacity in the new appeal court. The impact of the regulations is to effect the prevention, restriction and distortion of competition in the market. It also amounts to the abuse of a dominant position. Only the PDSO financed by SLAB could afford to represent appellants. No solicitor could afford to do so and nor could any solicitor advocate. In addition neither the Scottish Government nor SLAB appears to have considered that the new court was not in existence at the time solicitor advocates were introduced and there is a question as to whether their interpretation of the legislation concerning the restriction on rights of audience is correct. This is of even greater significance given the greater sentencing powers afforded to the Sheriff Court and the introduction of the new Appeal Court. There is also a significant impact on solicitors as a result of the new regulations. Counsel are to receive a block fee for their work. That is considerably more than a solicitor who may be appearing for a co appellant will receive. A situation could arise where there are two or more appellants in for example a stated case. If one is represented by counsel he will paid £250 for the appeal and the solicitor £27.40. In sentence appeals that would be £150 for counsel and £27.40 for the solicitor. Again I would suggest the impact is to distort the market by limiting choice.

12. As stated above the response of SLAB and the Scottish Government may be that the Public Defence Solicitors could undertake the appeal work. This would mean that the Scottish Government and SLAB had effectively excluded solicitors by prescribing fees so low only a Government and SLAB financed operation could undertake such work. That would clearly be incompatible with an Appellant's rights in terms of article 6 and would contravene the Competition Act 1988.

13. I would suggest there are a number of issues about the legality of the new regulations and that the matter may ultimately require to be considered by the Competition Authority and the Supreme Court in due course.

Ann Ogg
Solicitor advocate
5 September 2015